In the Supreme Court of the United States

October Term, 1975

No. 75-563

THEODORE JAMES SANTOS, JR.,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

No. 75-564

PAUL RICHARD, a/k/a RICHARD ANTHONY HARRIS,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF IN OPPOSITION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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QUESTION PRESENTED

Does the case of *Brown v. Illinois* require Supreme Court review, where the holdings in the Courts below are clearly consistent with the rule and rationale of the *Brown* decision?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF FACTS

The facts of this case are as set forth in the opinion by the Superior Court of Pennsylvania, as follows:

> "On November 16, 1972, State Trooper Max Seiler received a radio broadcast to the effect that a white International Travelall, California registration SZH992, with two white male occupants, had entered the Turnpike at Breezewood carrying a large quantity of marijuana. Trooper Seiler, who was in the vicinity, responded to the call and soon sighted the vehicle heading east. After calling for assistance, Trooper Seiler followed the van until Trooper Thomas Geary appeared on the scene. With one patrol car in the rear, the troopers signalled the driver of the van, appellant Santos, to pull over. Each trooper emerged from his car armed, and instructed the occupants of the van to get out and "spreadeagle" against the van. After the "patdown" proved that the appellants were unarmed, the troopers returned their weapons to their cars.
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> "While Trooper Seiler radioed that the appellants had been apprehended, and waited for information concerning the status of the vehicle registration and appellants' drivers' licenses, Trooper Geary gave the appellants their *Miranda* warnings and ascertained that they understood them. He then informed them that the police had reason to believe that they were transporting a large quantity of marijuana, and asked appellants if they would permit the troopers to search their van, advising them as follows:

'I want you to keep this in mind, that if you give me permission and if we would find anything in the vehicle it would be used against you – I want you to understand this . . . . . You do not have to give me permission to search the vehicle.'

"When Trooper Seiler returned to the van (there were no irregularities in appellants' registration or licenses), he also gave appellants their *Miranda* warnings and ascertained that they understood them.

"He then advised appellants that in Pennsylvania they were not required to consent to the search and could demand that the police produce a warrant. Despite those warnings, Santos and Richard orally consented to the search. Troopers Seiler and Geary, however, were reluctant to search unless appellants consented in writing. Both Santos and Richard then signed a handwritten consent granting the troopers permission to search the van. Appellant Santos then went to the front seat of the van, removed a box from under the seat, and extracted a set of keys which he used to open the tailgate.

"There was nothing suspicious about the inside of the van – it contained suitcases, clothing bags, a cooler, a mattress and blankets. Santos then said, 'where would you like to start;' and, Trooper Seiler selected one of the suitcases. Santos thereupon opened the combination lock on the suitcase and began removing the clothing inside. Trooper Seiler noticed that among the piles of clothing there was a tightly rolled newspaper, and upon unrolling the newspaper, discovered a quantity of marijuana. Undaunted, Santos asked where the troopers would next like to look, and Seiler selected a second suitcase, whereupon Santos remarked, "Here's where

you make sergeant." Santos undid the combination lock and opened the suitcase which was filled with marijuana packaged in large bundles. Appellants were then handcuffed and taken to the local State Police barracks. A subsequent search revealed other large caches of marijuana, similarly packaged, including 49 kilos concealed in a compartment cut out of the floor of the van and recovered with the plywood flooring. In all, appellants had been transporting more than 225 pounds of the contraband.

"At the suppression hearing appellant Santos corroborated the troopers' testimony that they had advised appellants of their rights, including their right to refuse to consent. Santos alleged, however, that the troopers had stated that if appellants did not consent, they would impound the van and get a search warrant. Both troopers disagreed that they had so phrased their advice and explained why they did not – they were aware that representations of the availability of a search warrant could be construed to be coercive and thereby vitiate the consent. The question, therefore, was one of credibility properly left for resolution by the hearing court below.

"Additionally, the Court noted that Troopers Seiler and Geary transported appellants to the District Justice's office for arraignment, . . . during that time Trooper Seiler asked Trooper Geary, both of whom were in the front seat, if he had seen a recent television program dealing with the smuggling of marijuana into the United States from Mexico. Upon hearing this conversation, Richard, who was sitting with Santos in the back seat, stated: 'If you're ever in California and want marijuana, see me.' At that point Trooper Geary asked Santos if the marijuana came from Mexico, and Santos answered, 'It's not mine.' Whereupon Richard immediately admitted: 'It's mine.' "

Argument Opposing the Writ

ARGUMENT OPPOSING THE WRIT

THE DECISIONS BELOW ARE CLEARLY CONSISTENT WITH THE RULING AND RATIONALE OF *BROWN V. ILLINOIS,* THEREFORE NEGATING ANY NEED FOR SUPREME COURT REVIEW.

Petitioner alleges that the courts below failed to apply the recent decision of *Brown v. Illinois,* No. 73-6650 (June 26, 1975), and that such failure mandates review by this Court. Respondent submits that proper consideration was given to the *Brown* decision, abrogating the need for further reconsideration on the present factual situation by the United States Supreme Court.

In requesting review of the Pennsylvania Superior Court decision by the Pennsylvania Supreme Court, petitioners specifically called attention to the pending *Brown* case, not decided at that time. That Court denied allocatur on July 14, 1975, over two weeks *after* the *Brown* decision was handed down. The decision was therefore available to the Supreme Court of Pennsylvania before it declined to hear petitioners' appeal. Furthermore, the *Brown* case is not inconsistent with the cases of *In Re: Betrand,* 451 Pa. 381 (1973) and *Commonwealth v. Bishop,* 425 Pa. 175 (1967), wherein the Supreme Court of Pennsylvania has held that *Miranda*[1] warnings, without more, do not purge the taint of an illegal arrest.

On collateral attack in United States District Court, petitioners again specifically raised the applicability of the *Brown* decision. The decision of the United States District

Argument

Court considered *Brown* and concluded that *Brown* did not warrant a reversal of the convictions of Santos and Harris.

Therefore, the *Brown* case was considered by the lower Courts. The mere fact that lower courts held *Brown* was not applicable to reverse on the instant facts is not an issue of constitutional magnitude necessitating further review.

It is submitted that petitioners misconceive the scope of *Brown. Brown* deals with a Fifth Amendment question, involving voluntariness of a confession, while the instant cases deal with the voluntariness of a search which is a Fourth Amendment issue. *Brown* does not abolish the case-by-case nature of any consideration of voluntariness. While holding that the mere giving of *Miranda* warnings, without more, will not dissipate the taint of an illegal arrest, the *Brown* decision does not hold that such taint can in no circumstances be removed.

As noted in *Brown:*

> "The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see *Johnson v. Louisiana,* 406 U.S. 356, 365 (1972), and particularly, the purpose and flagrancy of the official misconduct are all relevant. See *Wong Sun v. United States,* 371 U.S. at 491."

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[1] *Miranda v. Arizona,* 384 U.S. 436 (1966)

Argument

The present fact situation has much more than mere perfunctory giving of *Miranda* warnings. Here, *Miranda* warnings were given on at least two occasions, and petitioners were specifically told they had an absolute right to refuse to allow the search.

In his concurrence in the Pennsylvania Superior Court's opinion, Judge Spaeth pointed out:

> ". . . appellants were specifically told they did not have to consent. Further, the troopers took the unusual precaution of obtaining appellants' written consent."

The conduct of the officers went far beyond mere recitation of *Miranda* warnings. Petitioners here were informed of their rights under both the Fourth and Fifth Amendments; whereas, *Brown* involves only the giving of the latter. Thus, even if the initial stop was improper, the rule petitioners glean from the *Brown* decision does not demand suppression, as that rule deals with *Miranda* warnings as the *only* dissipating factor.

That any taint was in fact dissipated is manifested by petitioners' conduct during the search itself. The petitioners' attitude was variously described as "light-hearted, if not cavalier" (J. Cercone for the Superior Court majority) and "hard-boiled bravado" (J. Spaeth, concurring with the Superior Court majority). The entire record reflects through petitioners' words and conduct that petitioners were not coerced, but rather were acting voluntarily throughout the entire incident.

Petitioners further allege that no basis was ever established for the stop of their vehicle, that the show of force was unwarranted, and that the officers used fraud in obtaining consent to search. Petitioners' allegations are said to comprise flagrant police misconduct.

Argument

Respondent submits that (1) the stop and detention was proper, based on the radio bulletin the officers received, (2) that the temporary drawing of weapons was reasonable since the troopers knew only that the occupants were suspected of interstate transportation of large amounts of contraband, and (3) that no fraud was used at any point in the episode.

The United States District Court utilized the rationale of *Terry v. Ohio*, 392 U. S. 1, 20 L. Ed. 2d 889 (1968), and *Adams v. Williams*, 407 U.S. 142, 32 L. Ed. 2d 612 (1972), and found the stop reasonable, stating:

> "While the arrest was not based on valid probable cause and was therefore illegal, the stopping of the van and the subsequent search were justified under the circumstances and did not amount to flagrant or wanton misconduct."

This conclusion is bolstered by the rationale underlying *Whiteley v. Warden*, 401 U.S. 560 (1971), where a stop, as here, was held reasonable based solely on receipt of a police radio bulletin. Since the seizure of contraband in the present case was thereafter based on a consent search, the Commonwealth does not have to establish independent probable cause to justify the seizure. This case represents exactly the type of fact situation wherein a consent search was utilized to ferret out contraband which would have otherwise gone undetected. Such strategy had been encouraged by your Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

The United States District Court summarized the issue of coercion and misconduct as follows:

> "By reason of the fact that the defendants demanded to know why they had been stopped before they would

acknowledge the *Miranda* warnings, and in light of their conduct during the search itself, it appears that not only is any contention of submission or acquiescence to flagrant official conduct dispelled, but also that such conduct on the part of the petitioners constitutes an intervening cause for consent so unrelated to the initial illegality that the acquired evidence may not reasonably be said to have been directly derived from, and thereby tainted by, that illegal arrest."

The factual determination by the Courts below was therefore justified by the evidence and the record, based on the *Brown* decision and related cases. Since review of cases such as this one must be made on a factual, case-by-case basis, there is no constitutional issue of sufficient magnitude to warrant the granting of a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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